

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

**PLAINTIFF’S RESPONSE TO DEFENDANT ANTE SODA’S MOTION TO
DISMISS PLAINTIFF’S COMPLAINT**

INTRODUCTION

1

1 the present case or any part thereof. The entire argument of the Pending Motion
 2 hinges upon the Defendant's bare assertion that the Defendant did not do what the
 3 complaint alleges. If this court were to adopt the legal standard argued for in the
 4 Pending Motion, then any civil defendant would be immune from liability by
 5 merely saying "I didn't do it." Of course, this is not the legal standard for a 12(b)(6)
 6 motion.

7 Furthermore, the Defendant's arguments defy the prevailing case law
 8 governing Internet piracy cases, such as the one at hand. While it is true that
 9 many courts have recognized the possibility that multiple persons may make use of
 10 the same IP address, and that a person identified as the subscriber associated with
 11 a given IP address may not be the party directly responsible for infringement
 12 occurring at that IP address, Plaintiff is not aware of any court that has relied
 13 upon that mere possibility as grounds for a 12(b)(6) dismissal. On the contrary,
 14 most, if not all, of the jurisdictions that have taken up this issue have roundly
 15 rejected the Defendant's arguments within a 12(b)(6) context.¹ Indeed, granting a
 16 12(b)(6) dismissal on such grounds would contravene long established case law
 17 requiring that the court accept the facts as pled within the Complaint as true and
 18 view them in the light most favorable to the non-movant party.

19 Meanwhile, as demonstrated below, the Plaintiff has amply satisfied the
 20 pleading requirements necessary to overcome a 12(b)(6) motion in this matter. The
 21 Plaintiff has pled a strong *prima facie* case of copyright infringement, alleging that
 22 the Defendant, and co-defendants, intentionally made use of bittorrent software for
 23 the express purpose of illegally downloading and sharing the Plaintiff's motion

24 ¹ See e.g. *Patrick Collins, Inc. v. Doe*, 945 F.Supp.2d 367 (E.D.N.Y., 2013); *Malibu Media, LLC v. Does I*, No. 12
 25 Civ. 2078, 2013 WL 30648, at *4 (E.D.Pa., January 3, 2013); *John Wiley & Sons, Inc. v. Doe Nos. 1–30*, 284 F.R.D.
 26 185, 189 (S.D.N.Y.2012); *Malibu Media, LLC v. Pelizzo*, No. 12 Civ. 22768, 2012 WL 6680387, at *3
 27 (S.D.Fla.2012); *Braun v. Primary Distributor Doe No. 1*, Nos. C 12–5786 MEJ, 12–5814 MEJ, 12–5812 MEJ, 12–
 28 5813 MEJ, 2012 WL 6087179, at *3 (N.D.Cal. Dec. 6, 2012); *Sunlust Pictures, LLC v. Does 1–75*, No. 12 Civ.
 1546, 2012 WL 3717768, at *4 (N.D.Ill.2012); *Malibu Media v. Sanchez*, No. 13 Civ. 12168 (E.D. Mich., Jan 15,
 2014); *Malibu Media v. Michael Harris*, No. 12 Civ. 1117-WTL-MJD (S.D. Ind., July 18, 2013); *Malibu Media v.*
Lowry, No. 13 Civ. 01560-MEH (D. Colo., Nov. 14, 2013); *Cobbler Nevada v. Hellman*, No. 15 Civ. 00909 (D. Or.,
 Dec. 14, 2015); *Malibu Media v. John Doe*, No. 15 Civ. 3185 (D. Md., Sep. 12, 2016); *Countrymen Nevada v.*
Amanda Pitts, No. 14 Civ. 493-Orl-40GJK (M.D. Fla., Dec. 16, 2014).

1 picture. The mere fact that the Defendant claims he didn't directly commit the
2 acts alleged in the complaint is an insufficient basis for dismissal of the case.

3 Accordingly, the Plaintiff respectfully requests that this Court DENY the
4 Pending Motion and allow this case to move forward into the discovery phase.

5 Respectfully submitted March 26, 2017.

6
7 /s/ Charles C. Rainey
8 CHARLES C. RAINEY, ESQ./MBA/LLM
9 Nevada Bar No. 10723
10 crainey@hamricklaw.com
11 HAMRICK & EVANS LLP
12 7670 W. Lake Mead Blvd., Ste. 140
13 Las Vegas, Nevada 89128
14 +1.702.425.5100 (ph)
15 +1.818.763.2308 (fax)
16 *Attorney for Plaintiff*
17
18
19
20
21
22
23
24
25
26
27
28

HAMRICK & EVANS, LLP

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **FACTUAL AND PROCEDURAL BACKGROUND**

4 The Plaintiff is the lawful owner of the copyright for the motion picture
5 LONDON HAS FALLEN,” a feature-length film distributed in the United States
6 and markets abroad (hereinafter referred to as the “Work”). *See* Plaintiff’s First
7 Amended Complaint at Ex. 2 [Dkt. No. 7-2](hereafter referred to as “FAC”). As also
8 noted in the FAC, the Defendant retained the services of a third party expert,
9 MAVERICKEYE UG (“Maverickeye”), to identify IP addresses of Internet users
10 engaged in the illegal and unauthorized copying of the Work via the Internet. *See*
11 FAC at p. 8. In this specific case, Maverickeye identified IP Address 72.193.59.93
12 as one of the IP Addresses engaged in the unlawful download and sharing of the
13 Work. *See* FAC at p. 9, Ex. 1. Defendant’s Pending Motion does not question the
14 validity of the Plaintiff’s copyright in the Work, nor does it question the technical
15 accuracy or validity of the methods used by Maverickeye to identify the subject IP
16 Address.

17 Using the information collected from Maverickeye, the Plaintiff filed the
18 present case, identifying the Defendant by her IP Address. *See* Plaintiff’s
19 Complaint [Dkt. No. 1]. Then, pursuant to prevailing precedent, the Plaintiff
20 moved this court for an order to open limited discovery for the purpose of
21 identifying the individual associated with the subject IP address. [Dkt No. 3]. This
22 Court granted that motion on August 30, 2016 [Doc. No. 5], and the Plaintiff
23 immediately served a subpoena upon the Defendant’s Internet Service Provider
24 (“ISP”), in which Plaintiff requested from the ISP the name and contact
25 information of the individual subscriber for each IP address identified within the
26 Complaint.

27 The ISP then, after conducting its own internal investigation of the matter,
28 identified IP Address 72.193.59.93 as belonging to Defendant ANTE SODA,

HAMRICK & EVANS, LLP

1 residing at 9028 Winthrop Springs Road, Las Vegas, Nevada 89139-7475 *See* **ISP**
2 **SUBPOENA RESPONSE AND INVOICE**, attached hereto as Exhibit “1” and
3 incorporated herein by reference. A further search of the public county records
4 associated with the foregoing address shows it to be a single-family residence,
5 wholly owned by Defendant ANTE SODA.

6 Again, the Pending Motion makes no challenge, nor offers any evidence to
7 challenge, the methods or techniques used by the ISP to identify the Defendant as
8 the individual accountholder associated with IP Address 72.193.59.93. Moreover,
9 the Defendant does not appear to even question that an infringement of the
10 Plaintiff’s Work occurred using the subject IP Address. Indeed, the Defendant’s
11 entire argument appears to be that some unknown third party must have used the
12 Defendant’s Internet service to illegally infringe upon the Plaintiff’s Work. In
13 short, the Defendant’s argument is “I didn’t do it.”

14 At this point, the Plaintiff has demonstrated the following uncontroverted
15 facts:

- 16 1. The Plaintiff is the lawful owner of the Copyright in the Work;
- 17 2. The Work was infringed upon; and
- 18 3. The infringement occurred at the Defendant’s address, using the Defendant’s Internet
19 service.

20 None of the foregoing facts are in dispute. Moreover, based on the foregoing
21 facts, out of the universe of possible suspects responsible for the infringement, the
22 Defendant is far and away the most likely culprit. As further explained in the
23 legal analysis below, and based upon prevailing case law, the foregoing
24 uncontroverted facts provide a clear *prima facie* case of copyright infringement
25 against the Defendant, which cannot be overcome in a 12(b)(6) setting by merely
26 asserting one’s innocence. The court must DENY the Defendant’s Pending Motion.

HAMRICK & EVANS, LLP

1 II.

2 ARGUMENT

3 A. LEGAL STANDARD

4 In order to survive a motion to dismiss under FRCP 12(b)(6) for failure to
 5 state a claim, "a complaint must contain sufficient factual matter, accepted as true,
 6 to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 US
 7 662, 678 (2009), *citing Bell Atl. Corp. v. Twombly*, 550 US 544, 570 (2007). A claim
 8 is facially plausible when the complaint alleges facts that allow the court to draw
 9 the reasonable inferences that the defendant is liable for the misconduct alleged.
 10 *Id.* When ruling on a motion to dismiss, the court must accept as true all factual
 11 allegations in the complaint and construe the pleadings in the light most favorable
 12 to the non-moving party. *Native Village of Kivalina v. ExxonMobile Corp.*, 696 F3d
 13 849, 867 (9th Cir 2012), *cert. denied*, 133 SCt 2390 (2013) (citation omitted); *see*
 14 *also NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The relevant
 15 question is, not whether a complaint's factual allegations are true, but whether the
 16 complaint contains sufficient factual matter accepted as true to state a complaint
 17 for relief that is plausible on its face. *Id.* It is only under extraordinary
 18 circumstances that dismissal is proper under FRCP 12(b)(6). *United States v. City*
 19 *of Redwood City*, 640 F2d 963, 966 (9th Cir 1981).

20 Meanwhile, to establish a claim of copyright infringement, a plaintiff must
 21 allege: (1) it owned a valid copyright, and (2) the defendant copied constituent
 22 elements of the work that are original without authorization. *Rice v. Fox Broad.*
 23 *Corp.*, 330 F.3d 1170, 1174 (9th Cir. 2003) (citing *Feist Publ'n, Inc. v. Rural Tel.*
 24 *Serv. Co.*, 499 U.S. 340, 361 (1991)).

25 B. PLAINTIFF PROPERLY PLED A CLAIM FOR COPYRIGHT INFRINGEMENT
 26 AGAINST THE DEFENDANT.

27 In the present case, there is no dispute as to whether the Plaintiff is the
 28 lawful owner of the copyright in the subject Work. Consequently, the Defendant

1 appears to center her argument upon the second element of a copyright claim –
 2 arguing that the Plaintiff somehow failed to allege that the Defendant copied
 3 constituent elements of the Work. However, that argument contradicts the plain
 4 language of the FAC.

5 The FAC specifically identifies ANTE SODA as one of the Defendants
 6 responsible for the copyright infringement. FAC at p. 3, para. 9(c). The FAC goes
 7 on to state that each Defendant, by reference including ANTE SODA, “installed a
 8 BitTorrent Client onto his or her computer.” FAC at p. 5, para. 16. The FAC then
 9 alleges that each Defendant used that BitTorrent Client to participate in a swarm
 10 of infringers, each copying “a piece of the Plaintiff’s copyrighted Work.” *Id* at p. 9,
 11 paras. 39 and 47. The FAC makes clear that this copying was in no way
 12 authorized, permitted or consented to by the Plaintiff. *Id* at p. 10, para. 40. The
 13 FAC even goes into a detailed explanation of how BitTorrent Client software
 14 works, and how the Plaintiff, using a third party expert, identified and tracked the
 15 infringing activity to the Defendant’s IP address. *Id* at pp. 5-9.

16 Indeed, the Defendant appears to accept as true all of the following facts:

- 17 1. The Plaintiff holds a valid copyright in the Work.
- 18 2. The use of torrent software to download and share the Work without the Plaintiff’s
 19 consent constitutes copyright infringement.
- 20 3. The Plaintiff’s experts identified a computer using the IP Address 72.193.59.93 as
 21 having engaged in the unauthorized downloading and sharing of the Work using a
 22 Torrent client.
- 23 4. The Defendant’s ISP identified the Defendant as the Internet service subscriber
 24 associated with IP Address 72.193.59.93.

25 The Defendant’s only argument appears to be that, even though the
 26 infringing activity occurred over the Defendant’s Internet account, the Defendant’s
 27 mere assertion of innocence is somehow sufficient grounds to entirely dismiss the
 28 Complaint. Even though the Complaint specifically alleges that the Defendant

1 infringed upon the Plaintiff's copyright, and even though that allegation is
2 supported by evidence from a third party expert and the Defendant's own ISP, the
3 Defendant seems to believe that he can dismiss this case based purely upon his
4 unsupported assertion of innocence.

5 This is not the standard for a 12(b)(6) motion and flies in the face of well-
6 established precedent, which requires that the Court accept the facts asserted in
7 the Complaint as true and construe all inferences in favor of the non-moving party.
8 *See Native Village of Kivalina v. ExxonMobile Corp.*, 696 F3d 849, 867 (9th Cir
9 2012), *cert. denied*, 133 SCt 2390 (2013) (citation omitted); *see also NL Indus., Inc.*
10 *v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

11 Meanwhile, the prevailing case law in Internet Piracy cases, such as the one
12 at hand, resoundingly disagrees with the Defendant's position. While it is true that
13 many courts have recognized the possibility that multiple persons may make use of
14 the same IP address, and that, as a result, the subscriber of a specific IP address
15 may not be the party directly responsible for the infringement, the Courts have
16 roundly rejected the notion that that a party may seek dismissal under 12(b)(6)
17 based purely upon the assertion that someone else may have used his or her IP
18 Address.

19 In fact, in a strikingly similar case in the Eastern District of New York,
20 *Patrick Collins, Inc. v. Doe* [945 F.Supp.2d 367 (E.D.N.Y., 2013)], the Court directly
21 addresses the very orders and opinions referenced by the Defendant in her Pending
22 Motion, but ultimately denies the defendant's motion to dismiss, noting that "the
23 difficulty that the Plaintiff will ultimately have in proving that the individual John
24 Doe Defendant was the one who actually utilized the IP address to commit the
25 accused copyright infringement is not relevant in the context of a motion to
26 dismiss." *Patrick Collins* 945 F.Supp.2d at 375.

27 In that case, just like here:

28 [t]he core of the Defendant's motion to dismiss is that '[t]he mere fact
that an individual pays for internet service with an ISP and is issued

1 an IP address is simply not sufficient factual information to support
2 the leap from sheer possibility to plausible.’ In other words, the
3 Defendant argues that IP subscribers are not necessarily copyright
infringers, but only possibly may be, and that this is insufficiently
plausible to state a claim for copyright infringement.

4 *Id* at 373.

5 However, the Court ultimately found that the facts alleged in the Complaint
6 (facts nearly identical to those alleged in this case) were sufficient to overcome a
7 motion to dismiss. The Court wrote:

8 It is true that the Defendant is identified only by his IP address, as it
9 was the IP address he subscribed to that was connected to the
10 investigative server to transmit a full copy or portion of the protected
11 media file at issue. Further, as both Magistrate Judge Gary R. Brown
12 and this Court have observed, there are doubts that the subscribers of
13 IP addresses are actually the individuals who carried out the
14 complained of acts. However, the difficulty that the Plaintiff will
15 ultimately have in proving that the individual John Doe Defendant
16 was the one who actually utilized the IP address to commit the
accused copyright infringement is not relevant in the context of a
motion to dismiss. Instead, at this time, the Plaintiff merely has to
state a plausible claim. Thus, while it is a reasonable possibility that
the Defendant here did not commit any copyright infringement
because another individual did so using his IP address, such as a
different family member, visitor, neighbor, or passerby, it is an equally
reasonable possibility that the Defendant committed the accused of
act.

17 *Id* at 375.

18 The Court went on to note “every court to have addressed this issue has found a
19 sufficiently alleged copyright infringement claim based on BitTorrent technology,
20 even when the defendant was merely identified with an IP address.” *Id* at 375,
21 *citing Malibu Media, LLC v. Does 1*, No. 12 Civ. 2078, 2013 WL 30648, at *4
22 (E.D.Pa. January 3, 2013); *John Wiley & Sons, Inc. v. Doe Nos. 1–30*, 284 F.R.D.
23 185, 189 (S.D.N.Y.2012); *Malibu Media, LLC v. Pelizzo*, No. 12 Civ. 22768, 2012
24 WL 6680387, at *3 (S.D.Fla.2012) (finding a similar complaint sufficient where a
25 plaintiff “simply alleged that a computer using the IP address assigned to
26 Defendant participated in the alleged infringing activity” despite the fact that the
27 Defendant argue[d] that the allegations [were] too speculative and conclusory to
28 adequately allege a plausible copyright infringement claim against an individual
person, specifically Defendant ... because they d[id] not explain how his

condominium unit was associated with the IP address at issue”); *Braun v. Primary Distributor Doe No. 1*, Nos. C 12–5786 MEJ, 12–5814 MEJ, 12–5812 MEJ, 12–5813 MEJ, 2012 WL 6087179, at *3 (N.D.Cal. Dec. 6, 2012) (concluding that the plaintiff had adequately asserted a federal copyright infringement claim because the plaintiff alleged that “Defendants actively engaged in or directly caused the copying by completing each of the steps in the BitTorrent filesharing protocol, including intentionally downloading a torrent file particular to Star Wars XXX. A Porn Parody, loading that torrent file into the BitTorrent client, entering a BitTorrent swarm particular to Star Wars XXX. A Porn Parody, and ultimately, downloading and uploading pieces of a Star Wars XXX. A Porn Parody file to eventually obtain a whole copy of the file.”); *Sunlust Pictures, LLC v. Does 1–75*, No. 12 Civ. 1546, 2012 WL 3717768, at *4 (N.D.Ill.2012) (“It is plausible, based on these allegations, that Doe shared copyrighted data with others in the swarm including some or all of the other defendants.”).

Meanwhile, federal Courts across the United States have continued to follow the foregoing pattern in the intervening years since the above-referenced *Patrick Collins* opinion in the Eastern District of New York. *See e.g., Malibu Media v. Sanchez*, No. 13 Civ. 12168, pp. 4, 6 (E.D. Mich., Jan 15, 2014) (Court denies Defendant Sanchez’ motion to dismiss, noting “As the subscriber in control of the IP address being used to distribute Plaintiff’s copyrighted movies, Defendant is the most likely infringer.”); *Malibu Media v. Michael Harris*, No. 12 Civ. 1117-WTL-MJD (S.D. Ind., July 18, 2013); *Cobbler Nevada v. Hellman*, No. 15 Civ. 00909 (D. Or., Dec. 14, 2015) (Court rejects Defendant’s argument that he should be dismissed as merely the subscriber of the Internet service where some infringement occurred, noting that, while it is possible that some other party used the defendant’s IP Address to commit the infringing acts, it is equally plausible that the Defendant committed those acts himself). *Malibu Media v. John Doe*, No. 15 Civ. 3185 (D. Md., Sep. 12, 2016) (Court finds that Defendant’s mere status as an internet service

subscriber is sufficient to overcome a motion to dismiss); *Tcyk, LLC v. Doe*, No. 13 Civ. 3127 (C.D. Ill, Sep. 29, 2014). *Malibu Media, LLC v. Doe*, No.14 Civ.932 (E.D. Wis., May 21, 2015) (“The complaint alleges that defendant is the IP address subscriber and the infringer, and while it is possible that someone other than the subscriber used the subscriber's internet connection to illegally download plaintiff's copyrighted materials, it is also plausible that the subscriber himself did so. At this stage in the litigation, this is enough”).

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that this Court DENY the Pending Motion and allow this case to proceed into discovery.

Respectfully submitted this March 26, 2017.

/s/ Charles C. Rainey
 CHARLES C. RAINEY, ESQ.
 Nevada Bar No. 10723
 chaz@raineylegal.com
 RAINEY LEGAL GROUP, PLLC
 9340 W. Martin Avenue, Second Floor
 Las Vegas, Nevada 89148
 +1.702.425.5100 (ph)
 +1.888.867.5734 (fax)
Attorney for Plaintiff

HAMRICK & EVANS, LLP